IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TYCO INTERNATIONAL LTD. and TYCO INTERNATIONAL (US) INC., Plaintiffs, v. L. DENNIS KOZLOWSKI, Defendant.	)	Case No. 02-cv-7317 (TPG)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS TYCO INTERNATIONAL LTD.'S AND TYCO INTERNATIONAL (US) INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AND DEFENDANTS' COUNTERCLAIMS

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Pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, Plaintiffs Tyco International Ltd. and Tyco International (US) Inc. (collectively, "Tyco") respectfully submit this memorandum of law in support of their motion for summary judgment on liability as to all claims asserted in Tyco's Amended Complaint against Defendant L. Dennis Kozlowski ("Kozlowski" or "Defendant") and on Defendant's Counterclaims against Tyco.

PRELIMINARY STATEMENT

While serving as Tyco's Chief Executive Officer and as a member of Tyco's Board of Directors, Kozlowski stole hundreds of millions of dollars from Tyco and deliberately concealed his thefts. The facts of Kozlowski's thievery and cover-up are established by his convictions on twenty-two felony crimes arising from his conduct from January 1995 through June 2002, and Kozlowski is estopped from denying the facts proven during his criminal trial. Tyco's civil causes of action are based on the same felonious conduct as Kozlowski's criminal convictions. Because Kozlowski's civil liability for his crimes is conclusively established, Tyco is entitled to summary judgment on liability. The only issue to be tried is the amount of Tyco's compensatory and punitive damages.

While serving a prison term for his crimes against Tyco, Kozlowski asserts counterclaims against Tyco for amounts he claims are owed under various severance and other employee-benefits agreements. However, Kozlowski forfeited his right to all compensation from the day of his first disloyal act against Tyco. The criminal trial proved that Kozlowski's illegal scheme began in January 1995, before his interest in any of the benefit plans at issue accrued. Accordingly, Tyco is entitled to judgment on Kozlowski's counterclaims.

FACTS AND PROCEEDINGS

A. Kozlowski's Criminal Convictions

Tyco's claims against Kozlowski in this action are based on the same wrongful conduct as his criminal convictions. Kozlowski's bad acts have been proven beyond a reasonable doubt in a court of law and affirmed on appeal. Kozlowski's criminal convictions conclusively establish his civil liability for the same conduct on which his convictions are based, and summary judgment on Kozlowski's liability is appropriate.

Beginning no later than January 1995, Kozlowski engaged in a scheme to misappropriate money and assets from Tyco and conceal his larcenous acts from Tyco's Board of Directors. (Tyco's Statement of Undisputed Facts ("SUF") ¶¶ 2, 64, 94, 108, 117-18). He also stole more than $100 million in unauthorized bonuses and many millions more in other thefts until his scheme began to unravel in January 2002. (SUF ¶¶ 64, 79).

In 2005, Kozlowski was convicted in New York state court of twelve counts of larceny, eight counts of falsifying business records, one count of securities fraud, and one count of conspiring to steal and commit other crimes against Tyco. (SUF ¶¶ 12-13, 18-19, 35, 93, 111, 115); *see also People v. Kozlowski*, 846 N.Y.S.2d 44 (N.Y. App. Div. 2007) (affirming convictions), *aff'd* 898 N.E.2d 891 (N.Y. 2008), *cert. denied* 129 S. Ct. 2774 (2009). The jury necessarily found that Kozlowski's illegal scheme began in 1995 and continued until his departure from the company in June 2002. (SUF ¶ 117). Kozlowski is currently in a New York state prison serving a sentence of 8 1/3 to 25 years. (SUF ¶ 20). All of his convictions have been affirmed on appeal. (SUF ¶¶ 25-26).

Kozlowski abused Tyco's Key Employee Loan Program ("KEL") in order to enrich himself at the expense of Tyco. (SUF ¶¶ 54-56). The KEL program, established to encourage ownership of Tyco common shares by executive officers and other key employees, provided loans for payment of taxes due upon vesting of shares under Tyco's restricted share ownership plan. (SUF ¶¶ 51, 52). However, Kozlowski used the KEL program as a personal line of credit to fund non-business luxury purchases. (SUF ¶¶ 54-56). Kozlowski concealed his thefts by failing to disclose these "loans" on periodic Director and Officer Questionnaires ("DOQs"), which Kozlowski knew the company used to prepare financial disclosures to the SEC and the investing public. (SUF ¶¶ 106, 108, 109).

In August 1999, Kozlowski stole $25 million from Tyco by having unapproved credits in that amount entered against his KEL account balance. (SUF ¶ 44). With these funds he purchased items such as million-dollar paintings, a multimillion-dollar yacht, $2 million worth of jewelry, and made a series of large personal investments, including an $8.3 million share in a sports partnership. *People v. Kozlowski*, 846 N.Y.S.2d at 49. He also stole $12.5 million from Tyco by wrongfully reducing the KEL balance of former Tyco Chief Financial Officer, Mark Swartz ("Swartz"). (SUF ¶ 45). These disloyal acts were the subject of two of his grand larceny convictions (Counts 1, 2). Kozlowski's concealment of these and other unapproved payouts were also the subject of several falsification of business records convictions. (SUF ¶¶ 93, 106).

Unbeknownst to Tyco's Board or its Compensation Committee, which had exclusive authority to grant compensation to executive officers or key managers, Kozlowski awarded himself and select others unauthorized "special bonuses" in connection with three Tyco transactions − the TyCom IPO and Tyco's acquisitions of ADT Automotive and FLAG Telecom. (SUF ¶¶ 61-78); *see also People v. Kozlowski*, 846 N.Y.S.2d at 45. These disloyal acts were the subject of six grand larceny convictions – Counts 3, 4, 5, 6, 8, and 9. (SUF ¶¶ 68-69, 73-74, 77-78). Like the KEL program abuses, Kozlowski concealed these so-called "bonus" payments by deliberately failing to disclose them on his DOQs, which falsifications were also the subject of several of his convictions. (SUF ¶¶ 106-110).

Kozlowski also caused Tyco to purchase fine art worth millions of dollars for his personal use. (SUF ¶¶ 49, 88). These thefts from Tyco were the subject of three of Kozlowski's grand larceny convictions – Counts 10-12. (SUF ¶¶ 49, 88-92). The jury rejected Kozlowski's claims that he was authorized to spend millions of dollars on artwork that he hung in his New York apartment which he also purchased with stolen Tyco funds. *People v. Kozlowski*, 846 N.Y.S.2d at 46-48.

Kozlowski's secret payment in 2001 to Tyco's former Lead Director and a former Chairman of Tyco's Compensation Committee, Frank E. Walsh, Jr. ("Walsh"), in reward for Walsh's facilitating Tyco's acquisition of a large financial services company, resulted in another larceny conviction − Count 13. (SUF ¶ 50). The jury found that Kozlowski lacked the authority to pay Walsh the $20 million fee and that he concealed the fact of the payment from other directors. (SUF ¶¶ 50, 79, 83, 85). These actions resulted in Kozlowski's conviction for stealing $20 million from Tyco for the unauthorized secret payment, and in Walsh's conviction for securities fraud, *i.e.*, violation of New York's Martin Act. (SUF ¶¶ 86-87).

Kozlowski and Swartz were convicted of felony conspiracy for their agreement to commit or aid the commission of crimes against Tyco and for committing at least one overt act in furtherance of that conspiracy – Count 14. (SUF ¶¶ 111-114).

Kozlowski defrauded Tyco through misrepresentation and deceit for the purpose of obtaining money and assets to which he knew he was not entitled. (SUF ¶¶ 115-129). For these acts, Kozlowski was convicted of securities fraud in violation of New York's Martin Act – Count 15. (SUF ¶ 115).

Kozlowski's larcenous scheme against Tyco also included transforming Tyco's New York Relocation Program into a special program for senior executives that permitted them to use millions of dollars of Tyco funds to purchase and speculate in New York real estate. (SUF ¶¶ 101-105). Kozlowski falsified New York Relocation Program documents, channeling tens of millions of dollars in Tyco funds as interest-free loans to certain Tyco employees, and improperly forgiving millions of dollars of these loans. (SUF ¶¶ 103-104). Kozlowski spent New York "relocation" funds on purchasing multiple residences, while causing Tyco to provide lavish rented premises in New York City, and used the program to have Tyco purchase his New Hampshire residence at an inflated price. (SUF ¶¶ 102-105). These acts were the subject of Kozlowski's felony conviction for falsifying business records regarding Tyco's New York Relocation Program − Count 16. (SUF ¶¶ 102-104).

Kozlowski also falsified the DOQs, which the company, as Kozlowski knew, relied on to prepare its financial disclosures. (SUF ¶¶ 106-109). Kozlowski falsified these disclosure documents by failing to list the millions of dollars he took in personal loans. (SUF ¶ 106). Kozlowski was convicted of seven felonies for falsifying DOQs – Counts 18-24. (SUF ¶ 106).

Judgment was entered in the trial court on September 19, 2005, convicting Kozlowski, after a jury trial, of grand larceny in the first degree (12 counts), conspiracy in the fourth degree, violation of New York General Business Law § 352-c(5) (securities fraud), and falsifying business records in the first degree (8 counts). He was sentenced to aggregate terms of 8 1/3 to 25 years, fined $70 million and, with Swartz, ordered to pay restitution of $134,351,397, to Tyco. *People v. Kozlowski*, 846 N.Y.S.2d at 50; *see also* SUF ¶¶ 12-13, 18-24.

B. Tyco's Claims Against Kozlowski

Tyco filed this action against Kozlowski in 2002 and filed an Amended Complaint in 2003. Tyco asserts twelve common law causes of action, including breach of fiduciary duty, fraud, conversion, and breach of contract, arising from the schemes on which Kozlowski's convictions are based. In addition to damages at law, Tyco seeks equitable remedies, including constructive trust, disgorgement, an accounting, and unjust enrichment. (Am. Compl. ¶¶ 108-173). Through its equitable claims, Tyco seeks disgorgement of at least $505,845,675.20 in benefits paid to Kozlowski between 1995 and 2002, the period of his proven criminal activity against Tyco.

Tyco seeks amounts in addition to the partial restitution that the criminal court ordered Kozlowski to pay to Tyco in connection with seven of his 22 felony convictions. The sentencing judge made clear that the restitution order was limited only to certain crimes and specifically excluded other crimes, including Kozlowski's thefts of Tyco funds in order to purchase millions of dollars of artwork for his personal use. (SUF ¶¶ 21-22). The restitution order also expressly excluded shareholder losses, "saddl[ing] the company with excessive debt as the result of [certain] transactions," amounts Kozlowski wrongfully caused to be paid to other employees, and deferred compensation and severance agreement monies. (SUF ¶ 23 and Exhibit 8 at 90-94).

Tyco's claims against Kozlowski arise out of acts committed in the County of New York, the same acts on which the District Attorney of New York based multiple indictments and which the jurors in Kozlowski's criminal trial determined occurred in the County of New York. (SUF ¶¶ 130-140).

On December 23, 2002, this action was transferred by the Judicial Panel on Multidistrict Litigation to the Honorable Paul J. Barbadoro in the United States District Court for the District of New Hampshire, where it was consolidated for pre-trial proceedings in an action styled *In re Tyco International, Ltd. Securities, Derivative and "ERISA" Litigation*, MDL No. 1335. On October 6, 2008, on Tyco's motion, Judge Barbadoro entered a temporary restraining order, and later a preliminary injunction, preventing Kozlowski from transferring or disposing of any assets or property (the "2008 TRO"). (SUF ¶¶ 28-31). After pre-trial discovery was concluded, this action was remanded back to this Court on September 14, 2009.

C. Kozlowski's Claims Against Tyco

Even though his fraud, conversion, breaches of fiduciary duty and other tortious acts have been conclusively established, Kozlowski, from prison, claims that Tyco owes him hundreds of millions of dollars in unpaid compensation. Kozlowski's Answer to Tyco's Amended Complaint includes Counterclaims seeking recovery of benefits under a Retention Agreement, an Executive Retirement Agreement ("ERA"), a Deferred Compensation Plan ("DCP"), a Supplemental Executive Retirement Plan ("SERP"), a Shared Ownership Insurance Agreement, and under Tyco's Bye-Laws. (Counterclaim at ¶ 7). Kozlowski claims that Tyco has violated its contractual obligations to him and violated the Employee Retirement Income Security Act of 1974 ("ERISA"), New York Labor Law, and common law by refusing to pay him these benefits notwithstanding his conviction for stealing millions of dollars from the company and concealing that theft for years.

Tyco entered into the ERA in 1999 to "retain the services of [Kozlowski]," noting that "the assurance of the continued services and loyalty of [Kozlowski] is essential to the future best interests of Tyco." (SUF ¶ 154, Exhibit 30). The ERA provided retirement benefits to Kozlowski in the form of monthly payments beginning at age 65 and continuing for the remainder of Kozlowski's lifetime. Alternatively, the ERA permitted Kozlowski to take a lump sum distribution of an amount actuarially equivalent to his monthly payments. (SUF ¶ 153, Exhibit 30).

The DCP was created in 1994 to allow Kozlowski and other participants to gain favorable tax treatment by electing to defer payment of certain compensation for receipt in later years. (SUF ¶ 151, Exhibit 29). The DCP would payout upon retirement, death, termination of employment or disability, although earlier payouts were permitted under specified conditions. (SUF ¶ 151, Exhibit 29).

The SERP supplemented Tyco's 401(k) plan by providing additional payments that could not be made under the 401(k) plan because of limitations under sections 401(a)(17) and 415 of the Internal Revenue Code. The SERP pays out upon retirement, death or termination of employment. (SUF ¶ 148, Exhibit 28). The ERA, DCP, and SERP are each "unfunded" executive compensation arrangements governed by ERISA § 201, 29 U.S.C. § 1051.

Under the Shared Ownership Insurance Agreement, Tyco paid the premiums for a policy insuring Kozlowski's life in the total face amount of $92,500,000. (SUF ¶ 155, Exhibit 31). The agreement provided that, if Kozlowski were to die, Tyco and Kozlowski's beneficiary would each be entitled to a portion of the proceeds. (SUF ¶ 155, Exhibit 31).

Because of Kozlowski's massive fraud and deception, his claims are barred and should be dismissed with prejudice.

ARGUMENT

During his criminal trial, the jury found beyond a reasonable doubt that the prosecution had proven the elements of each crime for which Kozlowski was convicted. Therefore, these elements are conclusively established for purposes of this civil action arising from the same conduct that resulted in his convictions. Because Kozlowski is estopped from denying any element of any charge of which he was convicted, Tyco is entitled to summary judgment on each of its claims against Kozlowski.

A "faithless servant" is not entitled to any compensation after his first act of disloyalty. Accordingly, Kozlowski is not entitled to recover wages for the period in which he was disloyal. Moreover, Kozlowski is collaterally estopped by his criminal convictions from arguing that Tyco somehow approved his actions. Similarly, federal common law developed under ERISA establishes that Kozlowski may not recover under executive ERISA plans for benefits accrued during periods of disloyalty. Accordingly, each of Kozlowski's claims against the company is barred and Tyco is entitled to judgment on Kozlowski's counterclaims.

I. Legal Standards

A. Summary Judgment Standard

Summary judgment is appropriate when there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Global Net Financial.com, Inc. v. Frank Crystal & Co., Inc.*, 449 F.3d 377, 381 (2d Cir. 2006). A material fact is one that would affect the outcome of the suit under governing law, and a dispute about a genuine issue of material fact occurs if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party opposing summary judgment "may not rely merely on allegations or denials in its own pleadings; rather, its response must…set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e).

B. New York Law Applies to Tyco's Claims Against Kozlowski

As the forum state, New York's choice of law rules govern this dispute. *Klaxon Co. v . Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). In tort claims, "New York applies an 'interest analysis' to identify the jurisdiction that has the greatest interest in the litigation based on the occurrences within each jurisdiction, or contacts of the parties with each jurisdiction, that relate to the purpose of the particular law in conflict." *Drenis v. Haligiannis*, 452 F. Supp. 2d 418, 427 (S.D.N.Y. 2006) (quoting *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 446 F. Supp. 2d 163, 192 (S.D.N.Y. 2006)); *GFL Advantage Fund, Ltd. v. Colkitt*, 2003 U.S. Dist. LEXIS 10643, at *3 (S.D.N.Y. 2003) ("the law of the jurisdiction having the greatest interest in the application of its law to the litigation in question will apply") (quoting *Advanced Portfolio Techs., Inc. v. Advanced Portfolio Techs., Ltd.*, 1999 U.S. Dist. LEXIS 1265 (S.D.N.Y. Feb. 8, 1999).

Most importantly, when the law to be applied is one which regulates conduct, such as that alleged by Tyco here, "the law of the jurisdiction *where the tort occurred* will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders." *Pension Comm.*, 446 F. Supp. 2d at 192 (quoting *GlobalNet Financial.com*, 449 F.3d at 384 (emphasis added); *Silverman v. H.I.L. Assocs. (In re Allou Distribs., Inc.)*, 387 B.R. 365, 395-396 (Bankr. E.D.N.Y. 2008) ("In tort cases, New York courts apply the law of the jurisdiction with the greatest interest in the dispute.") (quoting *Solow v. Stone*, 994 F. Supp. 173, 177 (S.D.N.Y. 1998)); *accord Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 337 (2d Cir. 2005) (the interest analysis is a "flexible approach intended to give controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation"); *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 756 N.Y.S.2d 367 (N.Y. Sup. Ct. 2003) ("the law of the place ... will usually have a predominant, if not exclusive concern ... because the locus jurisdiction's interests ... assume critical importance and outweigh any interest of common-domicile jurisdiction") (quoting *Schultz v. Boy Scouts of Am.*, 480 N.E.2d 679, 684-85 (N.Y. 1985)).

Because Kozlowski's tortious conduct occurred primarily in New York, New York law applies here.[1] During much of the time Kozlowski was conducting his criminal operations, Tyco maintained a principal office in New York. (SUF ¶ 139). Kozlowski also maintained a New York apartment. (SUF ¶¶ 49, 140); *see also People v. Kozlowski*, 846 N.Y.S.2d at 47. The New York District Attorney indicted Kozlowski in New York, Kozlowski was tried in a New York state court, and the District Attorney and the Securities and Exchange Commission ("SEC") brought civil forfeiture and fraud enforcement actions, respectively, against Kozlowski in this District.[2]

Kozlowski was convicted of multiple violations of the New York criminal code, including larceny, falsifying business records, securities fraud and conspiracy. Before convicting Kozlowski on any count, the jurors had to find beyond a reasonable doubt that at least one element of *each* crime was committed in New York County. (SUF ¶ 17). Kozlowski also currently resides in a New York prison facility. (SUF ¶ 20). Indeed, Kozlowski himself has asserted a counterclaim against Tyco under New York's labor laws. Because New York has shown the greatest interest in regulating Kozlowski's criminal behavior, the civil claims arising directly from that behavior are governed by New York law.

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[1] In an effort to avoid New York law, Kozlowski no doubt will assert that a narrower doctrine − the "internal affairs" doctrine − applies to determine the choice of law governing Tyco's tort claims. The "internal affairs" doctrine applies the law of the state of incorporation when regulating directors' conduct of the "internal affairs" of the corporation. "Internal affairs" encompasses "matters of organic structure or internal administration" such as steps taken in the course of the original incorporation, the election or appointment of directors and officers, the adoption of by-laws, charter amendments, and the holding of directors' and shareholders' meetings. The Restatement of the Law, Second, Conflict of Laws, § 302; *id.* at Comment e. Tyco's tort claims against its former officer and director arising from Kozlowski's larceny and other criminal conduct in New York go well beyond corporate "structure or internal administration" and, accordingly, the doctrine has no application here. *See Drenis v. Haligiannis*, 452 F. Supp. 2d at 427 (internal affairs doctrine does not apply to claims based on alleged fraudulent conveyance).

[2] In 2009, Kozlowski reached a settlement with the SEC on the commission's civil claims against him. (SUF ¶ 33). Kozlowski agreed to refrain from violating federal securities laws and from acting as an officer or director of a public company. (SUF ¶ 33, Exhibit 12).

C. Kozlowski is Estopped From Denying His Crimes Against Tyco

A criminal defendant is estopped from denying in a subsequent civil action all facts material and underlying to his criminal conviction. *SEC v. McCaskey*, 2001 WL 1029053, at *3 (S.D.N.Y. Sept. 4, 2001). When a defendant's criminal conviction collaterally estops him from denying liability in a subsequent civil case, summary judgment is properly granted. *See*, *e.g.*, *Merchants Mut. Ins. Co. v. Arzillo*, 472 N.Y.S.2d 97, 102 (N.Y. App. Div. 1984) (conviction of a civil action defendant is conclusive proof of the facts supporting a plaintiff's motion for summary judgment when (1) the criminal conviction and civil cause of action pertain to the same issue; and (2) the defendant received a "full and fair opportunity" to contest the alleged controlling conviction); *see also Pacho v. Enter. Rent-A-Car Co.*, 572 F. Supp. 2d 341, 347 (S.D.N.Y. 2008) ("New York courts generally grant preclusive effect to a criminal conviction, whether by jury verdict or guilty plea, in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case"); *Aramony v. United Way of Am.*, 28 F. Supp. 2d 147, 171 (S.D.N.Y. 1998).

Kozlowski's criminal convictions estop him from denying he engaged in the conduct underlying those convictions and, therefore, Kozlowski's convictions conclusively establish the facts necessarily found by the jury in the criminal trial. *Aramony*, 28 F.Supp.2d at 157-58. As a result of his twelve convictions for grand larceny, Kozlowski is estopped from denying that, on at least twelve occasions, he stole one million dollars or more from Tyco. (Counts 1-6, 8-13) (SUF ¶¶ 34-92). As a result of his convictions on eight counts of falsifying business records, Kozlowski is estopped from denying that, beginning in September 1995, he made or caused to be made false entries in Tyco's records with the intent to defraud the company, including the intent to commit another crime or to aid or conceal the commission of other crimes. (Counts 16, 18-24) (SUF ¶¶ 93-110). And, as a result of his conviction under the Martin Act, Kozlowski is estopped from denying that, beginning on January 1, 1995, he engaged in a scheme constituting a systematic ongoing course of conduct to defraud Tyco. (Count 15) (SUF ¶¶ 115-129).

These convictions conclusively establish that Kozlowski's fraudulent acts spanned the period from January 1995 through his departure from Tyco in June 2002. (SUF ¶¶ 2-4, 18, 94, 117). Kozlowski, then, cannot refute that he engaged in grand larceny, falsification of Tyco records, and fraud in violation of his duties to the company. Because the convictions conclusively establish the elements of Tyco's causes of action against Kozlowski, Tyco is entitled to judgment as a matter of law on its claims.

II. The Criminal Convictions Conclusively Establish the Civil Claims Against Kozlowski

Kozlowski's criminal convictions conclusively establish that Kozlowski's conduct since 1995 constitutes a clear and deliberate breach of his duties to Tyco through a pattern of non-disclosure, concealment and obstruction, and outright theft, which has caused substantial harm to Tyco. These convictions also establish that he induced others to breach their fiduciary duties to the company, that Kozlowski committed fraud, conversion and other torts against Tyco, which severely damaged the company.

Tyco has asserted twelve civil causes of action against Kozlowski. The elements of each criminal charge of which Kozlowski was convicted shows that the convictions conclusively establish the elements of Tyco's civil claims. *McCaskey*, 2001 WL 1029053, at *3; *Merchants*

Mut., 472 N.Y.S.2d at 102. Accordingly, Tyco is entitled to summary judgment on liability on each count of the Amended Complaint.

A. Kozlowski's Convictions Establish that Kozlowski Breached his Fiduciary Duties to Tyco and that Tyco Is Entitled to an Accounting (First and Sixth Causes of Action)

Summary judgment is appropriate on Tyco's claims for breach of fiduciary duty (First Cause of Action) and an accounting (Sixth Cause of Action) because the facts underlying these claims were conclusively established by Kozlowski's multiple convictions for stealing from Tyco (twelve counts of Grand Larceny in the First Degree), falsifying Tyco documents in order to conceal and to commit other crimes against Tyco (eight counts of Falsifying Business Records in the First Degree), violating the Martin Act (New York General Business Law § 352-c(5)), and conspiring to commit or aid in the commission of crimes against Tyco (Conspiracy in the Fourth Degree). (SUF ¶¶ 2-4, 12-15, 18-19, 35, 93, 111, 115).

As CEO and as a director of Tyco, Kozlowski owed a fiduciary duty to the company. (SUF ¶¶ 34, 39); *see also* Answer, Affirmative Defenses, and Counterclaims of L. Dennis Kozlowski at ¶¶ 12, 14; *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 568 (N.Y. 1984); *Gully v. NCUA Bd.*, 341 F.3d 155, 165 (2d Cir. 2003) (applying New York law) (directors owe duties of complete loyalty, honesty and good faith to the corporation). A director's duty of undivided and unqualified loyalty to the corporation encompasses good faith efforts to insure that his personal profit is not at the expense of his corporation. *Bubba Gump Fish & Chips Corp. v. Morris*, 2008 N.Y. Misc. LEXIS 7408, at *13-14 (N.Y. Sup. Ct. 2008); *see also Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 98 (N.Y. App. Div. 2006) (requirement of fidelity bars not only blatant self-dealing but also requires avoiding situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty).

When the jurors convicted Kozlowski of twelve counts of grand larceny, the jurors found that Kozlowski stole money from Tyco on at least twelve occasions. Kozlowski cannot deny that he stole from Tyco when he abused Tyco's KEL by wrongfully reducing his KEL account balance by $25 million and Swartz' KEL balance by $12.5 million in August 1999 (Counts 1 and 2); when he wrongfully paid himself and others millions of dollars in unauthorized bonuses (Counts 3-9); when he wrongfully used Tyco funds to purchase artwork for himself (Counts 10-12); and when he wrongfully paid a secret unauthorized fee to Tyco's then-lead director, Frank Walsh (Count 13). (SUF ¶¶ 35-92).

The jurors also found that Kozlowski made false representations on Tyco business records with the intent to commit or conceal the commission of crimes against Tyco relating to the New York City Relocation program (Count 16), and to his attestations on DOQs that he was not indebted to Tyco in an amount greater than $60,000 when, in fact, he had "borrowed" tens of millions of dollars each year from the company (Counts 18-24). (SUF ¶¶ 93-110). Kozlowski knew Tyco relied on these DOQs in preparing its financial disclosures. (SUF ¶ 109).

Likewise, Kozlowski's conviction for violating New York's Martin Act conclusively establishes that he committed securities fraud while serving as Tyco's CEO (Count 15). (SUF ¶¶ 115-129). In convicting Kozlowski of violating the Martin Act, the jurors necessarily found that Kozlowski intentionally engaged in a scheme to obtain property from Tyco by false and fraudulent representations and promises, and that he did so to obtain Tyco's property. (SUF ¶¶ 117-119, 124-129). The jurors also found that Kozlowski's illegal scheme began in January 1995. (SUF ¶ 117).

By repeatedly engaging in criminal conduct that victimized his employer, Kozlowski breached his fiduciary duty to Tyco. *See, e.g.*, *Foley v. D'Agostino,* 21 A.D.2d 60, 66-67 (1st

Dept 1964) (an officer breaches his fiduciary duties when he profits personally at the expense of the corporation). Accordingly, Kozlowski is estopped from denying he breached his fiduciary duty to Tyco and Tyco is entitled to summary judgment on liability for breach of fiduciary duty in the First Cause of Action. *McCaskey*, 2001 WL 1029053, at *3; *Merchants Mut.*, 472 N.Y.S.2d at 102.

In the Sixth Cause of Action, Tyco seeks an accounting in connection with Kozlowski's breach of fiduciary duty. The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest. *Palazzo v. Palazzo*, 503 N.Y.S.2d 381, 384 (N.Y. App. Div. 1986). In its claim for an accounting, Tyco alleges that Kozlowski breached his fiduciary and other duties to the Company and "profited from his breach of duty through the receipt of unauthorized and undisclosed amounts of money and credits, interest-free use of millions of dollars of Tyco's funds for unauthorized relocation loans, and unauthorized grants of hundreds of thousands of shares of Company stock, which Kozlowski promptly sold and on which he earned millions." (Am. Compl. ¶ 142).

Kozlowski's grand larceny convictions thus establish that he breached his fiduciary duty to Tyco "respecting property in which the party seeking an accounting has an interest." *See Palazzo*, 503 N.Y.S.2d at 384. Tyco's right to an accounting is further established by Kozlowski's convictions for falsifying Tyco business records because, in so convicting, the jurors necessarily found that Kozlowski made false representations on Tyco documents with the intent to commit a crime against Tyco or to conceal his commission of crimes against Tyco. (SUF ¶¶ 94-95). Because Kozlowski's convictions conclusively establish Tyco's breach of fiduciary duty claim, as a fiduciary, Kozlowski must account to his principal, Tyco, for the funds that he received during the course of his employment.

Thus, Tyco is entitled to summary judgment on liability for Kozlowski's breach of fiduciary duty (First Cause of Action) and on Tyco's claim for an accounting (Sixth Cause of Action). Tyco requests that this Court enter an order requiring that Kozlowski account to Tyco for the funds that he received during the course of his employment, including an accounting for the interest on the funds he obtained and benefits he obtained as a result of his wrongful use of Tyco's funds, without further delay.

B. Kozlowski's Convictions Establish That He Induced Swartz' Breaches of Fiduciary Duties (Second Cause of Action)

Summary judgment also is appropriate on Tyco's claim against Kozlowski for inducing Swartz' breach of fiduciary duty (Second Cause of Action) because the facts necessary to support this claim were conclusively established by Kozlowski's and Swartz' multiple convictions.

To establish that a defendant induced a breach of fiduciary duty, a plaintiff must prove (1) a breach by a fiduciary of obligations to another; (2) that the defendant knowingly induced or participated in the breach; and (3) that the plaintiff suffered damages as a result of the breach. *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 847-48 (2d Cir. 1987). "[A]nyone who knowingly participates with a fiduciary in a breach of trust is liable for the full amount of the damage caused thereby to the cestuis que trust." *Id.* at 848 (quoting *Wechsler v. Bowman*, 34 N.E.2d 322, 326 (N.Y. 1941)). Because the tort does not require proof of intent to harm, neither lack of intent nor proper business purpose is a defense. *Id.* at 849.

Here, Swartz breached fiduciary duties he owed to Tyco by enabling Kozlowski to obtain, and to conceal from the Board, unapproved and undisclosed compensation, and to enrich individuals in the company whom Kozlowski particularly wished to reward through undisclosed and unauthorized benefits and loans. (SUF ¶¶ 2, 21-22, 75, 112-114, 117, 120-21); *People v. Kozlowski*, 846 N.Y.S.2d at 45. Swartz' multiple convictions for disloyal acts against Tyco conclusively establish his own breach of his fiduciary obligations to Tyco, the first element to be proven under New York law. *See S & K Sales Co.*, 816 F.2d at 847-48.

Kozlowski's grand larceny convictions, both as principal and accessory to Swartz, establish that Kozlowski knowingly participated in Swartz' breaches of his fiduciary duties to Tyco, the second element to be proven under New York law. (SUF ¶¶ 35, 44-50, 116; Exh. 2 (Jury Charge) at 16018-19). The third and final element necessary to establishing Kozlowski's liability under this cause of action is that Tyco actually suffered damages as a result of the breach. *S & K Sales Co.*, 816 F.2d at 847-48. The criminal trial court, and the appellate courts which affirmed the convictions, all concluded that Kozlowski's disloyal acts damaged the company. (SUF ¶¶ 20-25); *People v. Kozlowski*, 846 N.Y.S.2d at 45, 50. Accordingly, summary judgment is appropriate on Tyco's Second Cause of Action for inducing Swartz' breach of fiduciary duty.

C. Kozlowski's Convictions Establish his Liability for Conspiracy to Breach Fiduciary Duties Owed to Tyco (Third Cause of Action)

To establish conspiracy to breach a fiduciary duty, Tyco must prove five elements: (1) a common agreement or understanding; (2) a common design or purpose to injure; (3) tortious or criminal act or acts committed in furtherance of the common agreement; (4) intent and knowledge regarding the acts; and (5) damage or injury to the plaintiff as a result of the acts of the defendants. *See* Conspiracy − Civil Aspects, 20 NY Jur. 2d, § 19.

Kozlowski's conspiracy conviction establishes three of the required elements − the existence of a common agreement or understanding, constituting a common design or purpose to injure, with intent and knowledge regarding the acts. (SUF ¶¶ 111-114). Specifically, the jurors found the prosecution had proven beyond a reasonable doubt that Kozlowski and Swartz each "agreed with one or more persons to engage in or cause the performance of conduct constituting grand larceny in the first degree, grand larceny in the second degree, or criminal possession of stolen property." (SUF ¶ 114). The jurors also found the prosecution had proven beyond a reasonable doubt that Kozlowski and Swartz "did so with the intent that such conduct be performed." (SUF ¶ 114). Accordingly, the conspiracy conviction precludes Kozlowski from denying that he (1) participated in a common agreement or understanding, the purpose of which was to steal from Tyco and, in so doing, breached his fiduciary duties to the company; (2) with a common design or purpose to injure the company; and (3) that he had intent and knowledge regarding the acts.

Kozlowski's convictions for falsifying Tyco business records and for stealing millions of dollars from Tyco establish the remaining two elements of this cause of action − that tortious or criminal acts were committed in furtherance of the common agreement and that Tyco suffered damage or injury as a result of the defendant's acts. Kozlowski and Swartz engaged in tortious conduct in furtherance of their agreement to breach their fiduciary duties by (1) stealing millions of dollars from Tyco; (2) awarding themselves, and others, unauthorized loans, bonuses and compensation; (3) misrepresenting and concealing their KEL Program indebtedness as well as their total purported compensation and benefits on documents relating to the New York Relocation Program and various DOQs; and (4) intentionally engaging in a scheme over a period of years to defraud Tyco and its investors. (SUF ¶¶ 12, 35, 93, 111, 115). Moreover, Kozlowski is estopped from denying that he injured Tyco through these disloyal acts. (SUF ¶¶ 14-15, 18-19).

Accordingly, the five elements of Tyco's cause of action for conspiracy to breach fiduciary duties are conclusively established and Tyco is entitled to summary judgment on liability for the third cause of action.

D. Kozlowski's Convictions Establish his Liability for Actual Fraud (Fourth Cause of Action)

Tyco is entitled to summary judgment on its claim for actual fraud. In order to prevail on a claim for actual fraud, a plaintiff must show: (1) a misrepresentation of a material fact; (2) which was false; (3) made for the purpose of inducing the other party to rely upon it; (4) justifiable reliance of the other party; and (5) injury. *See Klembczyk v. Di Nardo*, 265 A.D.2d 934, 935 (N.Y. App. Div. 1999). Because Kozlowski's convictions on eight counts of falsifying business records and one count of securities fraud conclusively establish each of the elements of Tyco's claim for actual fraud, Tyco is entitled to summary judgment on liability for the fourth cause of action.

Kozlowski made fraudulent misrepresentations to Tyco relating to the business records − the New York Relocation Program and his DOQs − which served as the basis for his falsifying business records convictions. (SUF ¶¶ 93-98). These criminal convictions establish that Kozlowski knowingly misrepresented to Tyco his KEL Program indebtedness and the total purported compensation he received, with the intent that Tyco would rely upon his misrepresentations. (SUF ¶¶ 104-110).

Kozlowski's criminal convictions establish that he falsified his DOQs by knowingly misrepresenting that he had no indebtedness to the company in excess of $60,000 "other than indebtedness arising from transactions in the ordinary course of business and indebtedness owed Tyco in connection with any loan granted in connection with the Company's [KEL Program]." (SUF ¶ 106). Additionally, Kozlowski's conviction for committing securities fraud precludes him from denying that from January 1, 1995 through his departure from Tyco in June 2002, he intentionally engaged in a scheme to defraud Tyco.[3] (SUF ¶ 117). Finally, there can be no question that Tyco has been injured by Kozlowski's fraud. As a result of his fraudulent acts, Tyco suffered damages from Kozlowski's thefts of its money and from the costs of the numerous lawsuits arising directly from the fraudulent acts and statements that served as the basis of his convictions. (SUF ¶¶ 20-21, 110, 160-62; Exh. 8 (Sentencing Tr.) at 92); *People v. Kozlowski*, 846 N.Y.S.2d at 48.

Because an element of the charges for larceny, falsifying business records and securities fraud is the intent to defraud the company, the convictions for falsifying business records and committing securities fraud conclusively establish his wrongdoing. (SUF ¶¶ 44-50, 94, 117, 125-127). Accordingly, Kozlowski cannot deny that he made misrepresentations of material fact, which were false, which he knew to be false, and that he made the misrepresentations for the purpose of inducing Tyco to rely on them. *McCaskey*, 2001 WL 1029053, at *3; *Merchants Mut.*, 472 N.Y.S.2d at 102.

The misrepresentations that formed the basis for the criminal charges and convictions also form the basis for Tyco's fraud and constructive fraud civil claims against him. Therefore, the business records and securities fraud convictions more than establish Kozlowski's liability for Tyco's actual fraud claim.

E. Kozlowski's Convictions Establish his Liability for Constructive Fraud (Fifth Cause of Action)

Similarly, Tyco is entitled to summary judgment on its claim for constructive fraud. The elements of constructive fraud are the same as those for actual fraud, "except that the element of scienter is replaced by a fiduciary or confidential relationship between the parties." *Klembczyk*,

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[3] Kozlowski's KEL abuses also served as the basis for at least one of his grand larceny convictions. (SUF ¶¶ 44-45).

265 A.D.2d at 935; *see also Hubbard v. Millard*, 156 A.D.2d 233, 235 (N.Y. App. Div. 1989) (equating constructive fraud with "intent presumed at law"). Thus, the element of scienter is replaced by "a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his confidence in the defendant and therefore to relax the care and vigilance he would ordinarily exercise in the circumstances." *Brown v. Lockwood*, 76 A.D.2d 721, 731 (N.Y. App. Div. 1980); *see also Williams v. Lynch*, 245 A.D.2d 715, 717 (N.Y. App. Div. 1997).

While in a fiduciary relationship with Tyco as its Chairman and CEO, Kozlowski made knowing misrepresentations to Tyco regarding loans he took and other amounts he received as purported compensation, and failed to disclose his illegal conduct to the Compensation Committee to induce them to award him further compensation. (SUF ¶¶ 44-50, 64, 67, 72, 76, 89, 101, 108, 117, 121-23). Accordingly, Kozlowski's convictions for falsifying business records and larceny conclusively establish his liability for constructive fraud for acts committed while he served as Tyco's chief executive and as a director. Because Kozlowski was a fiduciary to Tyco, and because his criminal convictions establish that he committed fraud against Tyco while in that fiduciary relationship, summary judgment is appropriate in favor of Tyco on the fifth cause of action.

F. Kozlowski's Convictions Establish that Tyco Is Entitled to a Constructive Trust (Seventh Cause of Action)

The ultimate purpose of a constructive trust is to prevent unjust enrichment. *Maiorino v. Galindo*, 2009 NY Slip Op 6123, 2 (N.Y. App. Div. Aug. 4, 2009). A constructive trust is appropriate "when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." *Id.* (citations omitted). A plaintiff seeking a constructive trust must show "(1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment." *Zane v. Minion*, 882 N.Y.S.2d 255, 256 (N.Y. App. Div. 2009) (*citing Simonds v. Simonds*, 45 N.Y.2d 233, 242 (N.Y. 1978)). These factors should, however, "be applied flexibly." *O'Brien v. Dalessandro*, 843 N.Y.S.2d 348, 349 (N.Y. App. Div. 2007).

Since at least January 1995, (1) Kozlowski was in a fiduciary and confidential relationship with Tyco; and (2) Kozlowski was an intentionally disloyal fiduciary who profited as a result of his disloyalty. The convictions for grand larceny, falsifying business records in order to commit or conceal a crime against Tyco, and securities fraud establish that Kozlowski was an intentionally disloyal fiduciary who profited as a result of his disloyalty. By these criminal convictions, Kozlowski is estopped to deny that he was enriched by his various breaches of duty, in various ways, including the receipt of unauthorized amounts, the use of company funds through the misuse of loan programs and unauthorized loans, and through other wrongful use of Tyco's assets and property.

Accordingly, Kozlowski is deemed to hold the funds and benefits he has received, and the interest and proceeds obtained on the use of the funds he wrongfully received, in constructive trust for the benefit of Tyco. Summary judgment should be entered on liability on the seventh cause of action.

G. Kozlowski's Convictions Establish that he is Liable to Tyco for Breach of the Company KEL Agreement (Eighth Cause of Action)

Kozlowski breached the terms of the Company's KEL Program to which he agreed to be bound. (SUF ¶¶ 59-60). The KEL Program required employees to repay all loans made by the Company upon termination. (SUF ¶ 60). The KEL Program terms provide that "[t]ermination of a Participant for cause will require immediate repayment of all outstanding loans and all accrued interest. Cause is herein defined as dishonesty or engagement in illegal activities in the course of employment, or the conviction of the Participant of a felony . . . ." (SUF ¶ 60, Exhibit 14 at 2).

Kozlowski also signed numerous promissory notes promising to pay back to Tyco the various sums he took from the KEL Program. (SUF ¶ 60, Exhibit 17 (ATYCA777551, 777553, 777555, 777561). The Promissory Notes obligated him to pay the principal and interest "in accordance with the terms of the 1983 Key Employee Loan Program, as amended through the date" of the Note. (*Id.*).

Indeed, Kozlowski has admitted that he participated in the KEL Program and received loans from Tyco through the KEL Program. (SUF ¶¶ 59-60). Despite demands for payment, Kozlowski has refused to repay his KEL loans, in violation of the Program terms and the terms of his Promissory Notes. (SUF ¶¶ 59-60).

Kozlowski's grand larceny convictions relating to his KEL abuses establishes that he breached the terms of the KEL program. In convicting Kozlowski on Count 1, the jurors concluded that Kozlowski stole from Tyco by abusing the KEL Program. (SUF ¶ 55). The convictions also establish that Kozlowski did not act under a good faith claim of right, *i.e.*, that he knew he did not have the authority to take the property, and that Tyco suffered damages as a result of Kozlowski's breach.

Kozlowski's criminal conviction conclusively establishes that he breached Tyco's KEL Program by failing to repay his outstanding KEL balance upon termination, and summary judgment on liability should be granted on Tyco's breach of contract claim.

H. Because Kozlowski is Precluded From Denying That He Breached His Fiduciary Duties and Defrauded Tyco, His 2001 Retention Agreement is Unenforceable and Declaratory Judgment Should Be Entered In Favor of Tyco (Ninth Cause of Action)

Where an "actual controversy" exists, courts have the authority to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. Where a court makes such a declaration, it will have "the force and effect of a final judgment." *Id.* The Federal Rules of Civil Procedure further provide that "[t]he existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." Fed. R. Civ. Pro. 57.

The purpose of a declaratory judgment "is to clarify and settle disputed legal relationships and to relieve uncertainty, insecurity and controversy." *Wachovia Bank Nat'l Ass'n v. Encap Golf Holdings, LLC*, 2010 U.S. Dist. LEXIS 14852, at *43-44 (S.D.N.Y. Feb. 19, 2010) (citing *Broadview Chemical Corp. v. Loctite Corp.*, 474 F.2d 1391, 1393 (2d Cir. 1973)). In determining whether to hear an action for declaratory judgment, the Second Circuit has directed district courts to ask: "(1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether a judgment would finalize the controversy and offer relief from uncertainty." *Id.* at 44 (citing *Duane Reade Inc. v. St. Paul Fire & Marine Ins.*, 411 F.3d 384, 389 (2d Cir. 2005)).

Here, a justiciable controversy exists as to the validity of Kozlowski's 2001 Retention Agreement. Tyco contends that Kozlowski's breaches of fiduciary duty and fraudulent misrepresentations used to induce Tyco to enter the agreement render it unenforceable, while Kozlowski has counterclaimed that the agreement is valid and that, therefore, Tyco has breached the contract. *See* Am. Compl. ¶¶ 158-161; *see also* Kozlowski's Counterclaim ¶¶ 45-50. Declaratory judgment will determine whether the contract is enforceable, ending any controversy as to the parties' rights and obligations under the 2001 Retention Agreement, or whether it is valid, thus requiring further litigation as to whether Tyco breached the contract.

Accordingly, for the reasons stated *infra* at Part III.A in support of Tyco's Motion for Summary Judgment on Kozlowski's First Counterclaim for breach of the Retention Agreement, the Court should declare that Agreement to be unenforceable.

I. Kozlowski's Larceny Convictions Establish His Liability to Tyco for Unjust Enrichment (Tenth Cause of Action)

Tyco alleges that Kozlowski has been unjustly enriched in various ways, including (1) by his unearned and unauthorized misappropriation of funds as purported compensation, which he concealed from the Board; and (2) by his receipt of unauthorized loans and other amounts as purported compensation from the Company, which either were not approved by the Compensation Committee or which were in excess of program amounts and limits approved by the Board for such loans and programs. (Am. Compl. ¶ 163).

To prevail on a claim for unjust enrichment, a plaintiff must establish (1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution. *See Carriafielio-Diehl & Assocs. v. D&M Elec. Contr., Inc.*, 784 N.Y.S.2d 617, 618 (N.Y. App. Div. 2004). To determine whether unjust enrichment exists, courts look to "the circumstances of the transfer and the relationship of the parties." *Johnson v. Lih*, 628 N.Y.S.2d 458, 459 (N.Y. App. Div. 1995).

The larceny convictions establish that Kozlowski wrongfully obtained Tyco's funds by KEL abuses, by awarding unauthorized TyCom IPO, ADT and FLAG bonuses, by using Tyco funds for purchases of artwork for his personal use, and by paying Walsh a $20 million unauthorized secret fee. These findings readily establish unjust enrichment. *McCaskey*, 2001

WL 1029053, at *3; *Merchants Mut.*, 472 N.Y.S.2d at 102. Thus, summary judgment is appropriate on liability for the tenth cause of action.

J. Kozlowski's Larceny Convictions Establish His Liability to Tyco for Conversion (Eleventh Cause of Action)

Tyco alleges that Kozlowski "came to exercise unauthorized dominion and control over hundreds of millions of dollars of Company funds, stock and assets, as well as assets obtained as a result of the improper use of Company resources . . . ." (Am. Compl. ¶ 166). To establish a conversion claim, a plaintiff must show that it had "an immediate superior right of possession to the identifiable fund and the exercise by [a] defendant[] of unauthorized dominion over the money in question to the exclusion of plaintiff's rights." *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Servs.*, 868 N.Y.S.2d 212, 213 (N.Y. App. Div. 2008) (citations omitted).

The larceny convictions establish that (1) Kozlowski wrongfully obtained Tyco's funds (by KEL abuses, awarding unauthorized TyCom IPO, ADT and FLAG bonuses, using Tyco funds for purchases of artwork for his personal use, and paying Walsh a $20 million unauthorized secret fee); (2) Tyco had a superior right of possession to the funds stolen by Kozlowski; and (3) Kozlowski's thefts damaged Tyco. *See id.*, 868 N.Y.S.2d at 213. These findings readily establish Kozlowski's liability to Tyco for conversion, and summary judgment on liability should be entered on Tyco's eleventh cause of action.

K. Kozlowski's Convictions Establish Tyco's Entitlement to Contribution (Twelfth Cause of Action)

Tyco alleges that Kozlowski breached his duties to Tyco in numerous ways, which actions resulted in the filing of a tremendous amount of litigation against the company, subjecting Tyco to legal fees and other costs. (Am. Compl. ¶ 172).

Kozlowski's felony convictions establish that he breached his duties to Tyco. These breaches resulted in the filing of numerous actions against Tyco because the vast majority of every complaint filed against the company concerned Kozlowski's bad acts. *See infra* pp. 41-42.

A contribution claim lies where the wrongdoer breaches a duty of care owed either to the injured party or to the plaintiff. *Sutherland v. Hallen Constr. Co.*, 585 N.Y.S.2d 55, 58 (N.Y. 1992). Contribution is available whether or not the culpable parties are allegedly liable for the injury under the same or different theories, and contribution may be invoked against intentional tortfeasors. *Calcutti v. SBU, Inc.*, 273 F.Supp. 2d 488 (S.D.N.Y. 2003). While the Private Securities Litigation Reform Act of 1995, and the bar orders in a number of the settled cases, bar contribution for certain settlement amounts, Tyco is entitled to contribution from Kozlowski for defense costs or other amounts to be determined at a trial.

For all of the aforementioned reasons, Tyco is entitled to summary judgment on liability as to all of Tyco's claims against Kozlowski.

III. Tyco Is Entitled to Summary Judgment on Kozlowski's Counterclaims

From his New York prison cell, Kozlowski asserts fourteen claims against Tyco to recover compensation allegedly promised him under his Retention Agreement and other contracts and plans, including his Executive Retirement Agreement ("ERA"), Deferred Compensation Plan ("DCP"), Supplemental Executive Retirement Plan ("SERP"), and Shared Ownership Insurance Agreement. Tyco was entitled to refuse to pay retention benefits to Kozlowski, who acted disloyally, and to unilaterally rescind any agreements induced by Kozlowski's fraud. Accordingly, Tyco is entitled to summary judgment on Kozlowski's claims for compensation paid during periods of disloyalty to the company. Kozlowski's remaining claims are based on miscellaneous equitable remedies that simply do not apply here. Kozlowski's claims against Tyco for unjust enrichment, conversion, and violation of New York's labor law for unlawful "charge[s] against" his "wages" also are baseless, and should be dismissed.

A. Tyco is Entitled to Summary Judgment on Kozlowski's Claims for Payment Under His Retention Agreement (First Counterclaim)

Proceeding under a breach of contract theory, Kozlowski claims that Tyco unlawfully failed to make payments due under his Retention Agreement. (Kozlowski's Counterclaim ¶¶ 45-50). Because Kozlowski was a "faithless servant," because he fraudulently induced Tyco to enter into the Retention Agreement, and because he committed a material breach of that Agreement, Tyco is entitled to summary judgment on the First Counterclaim.

1. Kozlowski Cannot Recover Anything Under the Retention Agreement Because He Was a "Faithless Servant"

By of his disloyal and criminal actions against Tyco, Kozlowski has forfeited his right to compensation under his Retention Agreement. *Feiger v. Iral Jewelry, Ltd.*, 363 N.E.2d 350, 351 (N.Y. 1977); *see also Phansalkar v. Andersen Weinroth & Co., L.P.*, 344 F.3d 184, 201-02 (2d Cir. 2003). An employee is obligated to be loyal to his employer, is prohibited from acting in any manner inconsistent with his agency or trust, and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. *Bon Temps Agency v. Greenfield*, 584 N.Y.S.2d 824, 825 (N.Y. App. Div. 1992); *Webb v. Robert Lewis Rosen Associates, Ltd.*, 2003 WL 23018792, at *6 (S.D.N.Y. Dec. 23, 2003); *see also* Restatement (Second) of Agency (1958) § 469.

The Retention Agreement states that it is governed by New York law. (SUF ¶¶ 143-146, Exhibit 24 ¶ 17). Under New York law, an agent who owes a duty of fidelity to a principal and "who is faithless in the performance of his services" is not entitled to recover his compensation, whether commissions or salary, for the period of disloyalty. *Colliton v. Cravath Swaine & Moore LLP*, 2008 U.S. Dist. LEXIS 74388, at *16 (S.D.N.Y. Sept. 24, 2008); *see also Feiger*, 363 N.E.2d at 351. Under this rule, known as the "faithless servant doctrine," an employer is entitled to recovery of "all salary and other compensation after his first faithless act." *In re Blumenthal*, 822 N.Y.S.2d 27, 28 (N.Y. App. Div. 2008); *see also Maritime Fish Prods. v. World-Wide Fish Prods.*, 474 N.Y.S.2d 281, 287 (N.Y. App. Div. 1984) (employer entitled to return of compensation paid employee during period of disloyalty). Significantly, it does not "make any difference that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent." *Feiger*, 363 N.E.2d at 351; *see also Phansalkar*, 344 F.3d at 201-02. "Where an employee is substantially disloyal in one of his tasks, he is prevented from recovering compensation for *any* of the tasks performed for that employer." *Colliton*, 2008 U.S. Dist. LEXIS 74388, at *16 (emphasis added).

When, as here, an employee's disloyalty has been conclusively established by a criminal conviction, that employee is collaterally estopped from denying such disloyalty, and summary judgment is appropriately granted on that employee's claims for unpaid wages. *See Fowler v. Brignoli*, 765 F. Supp. 1202, 1204-05 (S.D.N.Y. 1991) (granting summary judgment on claim for return of CEO's salary during period of disloyalty and self-dealing where CEO was found in prior proceeding to have breached his fiduciary duties and thus was collaterally estopped from relitigating the issue of his breach of fiduciary duty); *National Bank of Pakistan v. Basham*, 539 N.Y.S.2d 347 (N.Y. App. Div. 1989) (granting summary judgment in favor of bank on an employee's counterclaim for unpaid wages where the employee had previously plead guilty to falsifying business records in a check-kiting scheme). By virtue of his criminal convictions, Kozlowski is collaterally estopped from denying his disloyalty to Tyco or asserting that Tyco somehow approved his actions. *See Aramony,* 28 F. Supp. 2d at 171; *People v. Kozlowski,* 846 N.Y.S.2d at 46-47.

Thus, Kozlowski has forfeited his right to compensation under his Retention Agreement. *Feiger*, 363 N.E.2d at 351; *see also Phansalkar*, 344 F.3d at 201-02. Any benefits to which Kozlowski may have been entitled under this Agreement accrued during Kozlowski's period of disloyalty, which his securities fraud and other convictions establish began in January 1995 and continued through the end of his employment in 2002. (SUF ¶¶ 2, 93, 117, 147). Kozlowski had acted as a faithless servant well before any benefits accrued under the Retention Agreement and, under the faithless servant doctrine, he must forfeit all benefits under the agreement. Therefore, Tyco is entitled to summary judgment on Kozlowski's claims for unpaid wages, deferred compensation and other benefits pursuant to his Retention Agreement.

2. Kozlowski Fraudulently Induced Tyco To Enter Into the Retention Agreement

Even apart from the faithless servant doctrine, the Retention Agreement is unenforceable because Kozlowski fraudulently induced Tyco to enter into that Agreement. In 2000, Kozlowski suggested to the Chairman of Tyco's Compensation Committee that Tyco enter into an agreement with Kozlowski that would pay him additional compensation and benefits in exchange for his commitment to stay with Tyco for a specific period of time. (SUF ¶ 141). The purpose of the Retention Agreement was "to encourage [Kozlowski] to remain in the employ of the Company." (SUF ¶ 144). Unknown to the Committee, however, Kozlowski had been looting the company for years and concealing his thefts. *People v. Kozlowski,* 846 N.Y.S.2d at 46-47. Without knowledge of his "thievery," the Compensation Committee agreed to Kozlowski's proposed terms and Tyco and Kozlowski executed the Retention Agreement, dated January 22, 2001. (*Id.;* SUF ¶ 143).

Six months later, Kozlowski suggested an amendment to the formula for calculating his retention benefits. Kozlowski suggested substituting for the term "highest annual proxy bonus" the term "highest annual bonus earned (including cash, shares and other forms of consideration)" – a change that would result in a nearly tenfold increase in Kozlowski's benefits and would include in the calculation the illegal bonuses and compensation of which the Board was unaware. (SUF ¶ 146); *People v. Kozlowski,* 846 N.Y.S.2d at 46-47. The Committee agreed to the amendment, however, it did so without knowledge of Kozlowski's ongoing disloyal acts against the company and that he had been concealing the theft of millions of dollars from Tyco for his personal use. (SUF ¶¶ 64, 67, 72, 76, 83, 101, 107-108, 120-121, 125).

"Under New York law, a [party] may unilaterally rescind a contract that was induced by fraud." *Colliton*, 2008 U.S. Dist. LEXIS 74388, at *12-13; *Bazzano v. L'Oreal, S.A.*, 1996 U.S. Dist. LEXIS 6529, at *7 (S.D.N.Y. May 14, 1996). "In order to render a contract unenforceable due to fraudulent concealment, a defendant must show that: '(1) the opposing party had a duty to disclose material information, yet (2) made a materially false representation, (3) intended to defraud, (4) upon which the party reasonably relied and (5) suffered damages as a result.'" *Colliton*, 2008 U.S. Dist. LEXIS 74388, at *12-13 (quoting *Ferguson v. Lion Holding, Inc.*, 312 F. Supp. 2d 484, 496 (S.D.N.Y. 2004)).

Kozlowski's convictions preclude him from denying that he defrauded Tyco from 1995 through 2002 and that Tyco was damaged as a result. *See*, *e.g.*, discussion *supra*, at Part I.C. If it had known of Kozlowski's misconduct, Tyco would not have sought the continued "service" of a disloyal and thieving chief executive officer by entering into the Retention Agreement, nor would it have agreed to additional compensation and benefits valued at millions of dollars. For these reasons, Tyco is entitled to unilaterally rescind the contract. *Colliton*, 2008 U.S. Dist. LEXIS 74388, at *12-13. Additionally, Tyco is entitled to a declaration on Tyco's Ninth Cause of Action that the contract is unenforceable because Kozlowski fraudulently induced the company to enter into the Retention Agreement and to approve its amendment, while he was looting the company and concealing his thefts. *Colliton*, 2008 U.S. Dist. LEXIS 74388, at *12-13; *People v. Kozlowski,* 846 N.Y.S.2d at 46-47.

3. Kozlowski Materially Breached the Retention Agreement

Kozlowski's pattern of criminal conduct also constitutes a prior material breach of the Retention Agreement, providing another basis for entering judgment for Tyco. In New York, the commission of crimes during employment constitutes a material breach of an employee's contractual obligations and bars recovery on any alleged subsequent breach by the employer. *Colliton*, 2008 U.S. Dist. LEXIS 74388, *15 (holding that a party may rescind a contract where the other party's breach is "material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract") (citation omitted).

Here, the "object of the parties in making the [Retention Agreement]," as in *Colliton*, was to retain Kozlowski's "continued dedication" as CEO. (SUF ¶ 144). However, Kozlowski's crimes and breaches of his fiduciary obligations were "material and willful" and "substantial and fundamental," such that he was unfit to serve as CEO and the very object of the contract was defeated. *Colliton*, 2008 U.S. Dist. LEXIS 74388, *15; *People v. Kozlowski,* 846 N.Y.S.2d at 46-47; SUF ¶¶ 108, 120. Accordingly, Kozlowski's attempt to recover under the Retention Agreement fails.

For all of these reasons, Kozlowski cannot recover under the Retention Agreement (First Counterclaim), and Tyco is entitled to declaratory judgment that Kozlowski's 2001 Retention

Agreement is unenforceable (Tyco's Ninth Cause of Action).

B. Kozlowski's Claims for Benefits Under His ERISA "Top Hat" Plans Are Procedurally and Substantively Barred (Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Counterclaims)

Kozlowski claims entitlement to benefits under "top hat" executive compensation plans governed by ERISA, including the ERA, the DCP, and the SERP (collectively, the "Top Hat Plans"). For a variety of reasons, all of these claims should be dismissed.

1. Kozlowski's breach of contract claims for ERISA benefits are preempted by ERISA (Second, Fifth, and Sixth Counterclaims)

The second, fifth, and sixth counterclaims each plead breach of contract with respect to an ERISA benefit plan. The Top Hat Plans are "unfunded" executive compensation arrangements within the meaning of ERISA § 201, 29 U.S.C. § 1051, and specifically excluded from ERISA's vesting provisions under 29 U.S.C. § 1051(2). ERISA preempts all state law causes of action for benefits under ERISA plans, including breach of contract claims. *See* 29 U.S.C. § 1144(a); *Duggan v. Hobbs*, 99 F.3d 307, 309 (9th Cir. 1996); *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 591 (2d Cir. 1993) (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)). Accordingly, Tyco is entitled to summary judgment on Kozlowski's claims for breach of contract in the Second, Fifth and Sixth Counterclaims because they are preempted.

2. Kozlowski cannot recover for the amounts sought under his ERA because he failed to plead an ERISA claim (Second Counterclaim)

The ERA is an unfunded "top hat" pension plan governed by ERISA, under which the employer pays a specified monthly retirement income to the executive. (SUF ¶ 153); *see also Duggan*, 99 F.3d at 312; Dep't of Labor Op. 79-75A (Oct. 29, 1979). "ERISA defines a top hat plan as one which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." *Sznewajs v. United States Bancorp Amended & Restated Supplemental Benefits*

Plan, 572 F.3d 727, 734 (9th Cir. 2009) (quoting *Gilliam v. Nevada Power Co.*, 488 F.3d 1189, 1192-93 (9th Cir. 2007)); *see also* 29 U.S.C. §§ 1051(2), 1081(a)(3) & 1101(a)(1).

Participants may bring claims for benefits under an ERISA benefit plan through ERISA's civil enforcement provision, 29 U.S.C. § 1132(a)(1)(B), but state law breach of contract claims are preempted and not permitted by ERISA. *See, e.g., Kennedy*, 989 F.2d at 591. Kozlowski's Second Counterclaim is devoid of any claim for benefits under the ERA pursuant to ERISA's civil enforcement provision. Accordingly, Kozlowski's Second Counterclaim should be dismissed.

3. The Special Appeals Committee properly denied the ERISA benefit claims (Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Counterclaims)

Tyco's Special Appeals Committee (the "SAC") properly rejected Kozlowski's claim for benefits under each of these plans. (SUF ¶¶ 157-162). As the SAC found, Kozlowski forfeited his benefits under these plans through a "pattern of disloyal conduct [that] related back to at least early 1995" and "caused great damage to the Company." (SUF ¶ 156, Exhibit 27 at Jenkins Dep. Exhibit 17). The SAC considered various documents, including company records, internal memoranda, correspondence, Tyco's ethics policy, the SEC charge against Kozlowski, and Kozlowski's criminal indictment. (SUF ¶ 156, Exhibit 27 at 126-128, and at Jenkins Dep. Exhibit 14).

ERISA specifically excludes such "top hat" benefits from its vesting provisions under 29 U.S.C. §1051(2), and the SAC's decision is consistent with the federal common law of forfeiture under ERISA (discussed *infra*, at Part III.B.4) and should not be disturbed. Where the documents governing an ERISA benefit plan "confer upon a plan administrator the discretionary authority to determine eligibility, [a court] will not disturb the administrator's ultimate conclusion unless it is arbitrary and capricious." *Hobson v. Metro. Life Ins. Co.*, 574 F.3d 75, 82

(2d Cir. 2009) (internal quotations omitted). The SERP confers such discretion, stating that "the Company shall have…authority to determine, in its sole discretion, the rights and benefits and all claims, demands, and actions arising out of the provisions of the Plan of any Participant." (SUF ¶ 149). Likewise, the DCP states that the SAC "shall also have the discretion and authority to make, amend, interpret, and enforce all appropriate rules and regulations for the administration of this Plan and decide or resolve any and all questions including interpretations of this Plan, as may arise in connection with the Plan." (SUF ¶ 152). In light of Kozlowski's looting of Tyco since at least as early as 1995, the SAC's denial of benefits under these plans was not "arbitrary and capricious" and therefore should be upheld.

4. Kozlowski cannot recover under the Top Hat Plans for periods of disloyalty (Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Counterclaims)

Federal common law developed under ERISA provides that Kozlowski may not recover under the Top Hat Plans for benefits accrued during periods of disloyalty. *See, e.g.*, *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 155 (2d Cir. 1999); *Aramony*, 28 F. Supp. 2d at 171 ("Under the federal common law of forfeiture, which is derived from the consensus approach of state courts, employees cannot recover non-vested pension benefits that accrued during periods of disloyalty."); *Foley v. Am. Elec. Power*, 425 F. Supp. 2d 863, 870 (S.D. Ohio 2006). Although ERISA provides that vested benefits under qualified pension plans are not forfeitable even in the face of the employee's own misconduct, ERISA specifically excludes such "top hat" benefits from its vesting provisions under 29 U.S.C. § 1051(2); also, ERISA's vesting provisions do not apply to ERISA benefit plans that are not pension plans. *See id.*; ERISA § 201(1) & (2), 29 U.S.C. § 1051(1) & (2). Under clear, controlling authority from the Second Circuit and the Southern District of New York, Kozlowski has forfeited his benefits under the Top Hat Plans by his own disloyal, dishonest conduct, and his Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Counterclaims should be dismissed.

5. Kozlowski may not enforce the Top Hat Plans because he procured his participation in those Plans by fraud. (Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Counterclaims)

Kozlowski concealed his numerous disloyal schemes from the Tyco Board. (*See, e.g.*, SUF ¶¶ 64, 107-108); *People v. Kozlowski,* 846 N.Y.S.2d at 46-47. Had he informed his employer of his misdeeds, he would have been dismissed, and he would not have been permitted to participate in the Top Hat Plans or promised any future benefits under those plans or other compensation from Tyco. Kozlowski covered his tracks in an effort to extract more compensation from Tyco, including, but not limited to, promises under the Top Hat Plans. These actions and omissions constitute fraud in the inducement with respect to Kozlowski's participation in the Top Hat Plans, and he is barred from recovering under those plans.[4]

Kozlowski owed fiduciary duties, yet instead he lied, stole, and concealed his actions so that he would continue to be perceived as a loyal executive, fit for continued employment and deserving of additional compensation. Kozlowski's criminal convictions and admissions conclusively prove his intent to defraud the company. *See supra* Part II. Furthermore, Tyco

[4] Although the ERA, DCP and SERP each are governed by ERISA, ERISA does not regulate conduct that occurred before the plan was implemented and, therefore, does not bar defendants' fraudulent inducement defense under state law. *See, e.g., Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 991 (10th Cir. 1999); *Wilson v. Zoellner*, 114 F.3d 713, 719 (8th Cir. 1997); *Carroll v. Los Alamos Nat'l Sec., LLC*, 2009 U.S. Dist. LEXIS 42222, *28-37 (D.N.M. Apr. 28, 2009). Claims of fraudulent inducement are generally governed by the law of the jurisdiction reflected in the parties' choice of law provision. *See, e.g., Haynsworth v. Corp.*, 121 F.3d 956, 963 (5th Cir. 1997). The ERA is governed by Bermuda law, to the extent not governed by ERISA. (SUF ¶ 153 Exhibit 30 at ¶ 7.4). The DCP and the SERP each contain choice of law provisions stating that the plans are governed by New Hampshire law, to the extent ERISA does not apply. (SUF ¶ 148 Exhibit 28 at ¶ 20; ¶ 151 Exhibit 29 at ¶ 16.8). Under both jurisdictions, the elements of the fraudulent inducement defense are substantially the same as those under New York law, discussed above. *See Van Der Stok v. Van Voorhees*, 866 A.2d 972 (N.H. 2005). *Simons v. Magnolia Properties Limited*, Civil Jurisdiction No. 206 at ¶ 79 (Supreme Court of Bermuda Feb. 27, 2007).

relied on Kozlowski's misrepresentations and omissions in extending him continued employment and continued participation in the Top Hat Plans. Had he not taken affirmative actions of concealment, Tyco would not have allowed him to become a participant and to continue accruing benefits under these plans during the period of disloyalty. (SUF ¶¶ 6, 64, 67, 72, 76, 83, 94, 97-98, 101, 107-108, 120-121, 125).

As noted above, Kozlowski and Tyco executed the ERA on March 1, 1999, Tyco's DCP was approved on April 24, 1994, and the SERP was effective as of January 1, 1995. (SUF ¶¶ 148, 151, 154). Like the jury in Kozlowski's criminal trial, the SAC found that Kozlowski's looting was well underway by early 1995. (SUF ¶¶ 2, 94, 117, 160-62). Had Tyco been aware of this criminal activity when it first began, Tyco would have fired Kozlowski (as it did when it learned of the imminent sales tax indictment), after which Kozlowski would not have received any further benefits under Tyco's existing employee benefit plans, nor would he have had the opportunity to become a participant in any new plans or compensation arrangements. (SUF ¶ 6). By committing and concealing his crimes, Kozlowski fraudulently induced Tyco to enter into the ERA and to allow him to benefit under the DCP and the SERP.

C. Kozlowski's Promissory Estoppel Theories Are Misplaced (Seventh and Eighth Counterclaims)

Kozlowski invokes the doctrine of promissory estoppel for his seventh and eighth counterclaims, seeking payment under the DCP and the SERP. These claims should be dismissed for the reasons discussed *supra*. Moreover, promissory estoppel may not be invoked unless "injustice can be avoided *only* by enforcement of the promise." Restatement (Second) of Contracts, § 90 (emphasis added). In Kozlowski's case, enforcement of the DCP and the SERP would cause, not avoid, injustice by permitting Kozlowski to further profit from the company he defrauded and looted.

Under the common law of ERISA, "[t]he basic elements of promissory estoppel [are] (1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced." *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 79 (2d Cir. 1996). But ERISA requires more than fulfillment of these basic elements. An "ERISA plaintiff must adduce[] not only facts sufficient to support the four basic elements of promissory estoppel, but facts sufficient to [satisfy an] 'extraordinary circumstances' requirement as well." *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 85-86 (2d Cir. 2001) (quotations and citations omitted); *see also Schonholz*, 87 F.3d at 78. Here, Kozlowski cannot prove the elements of promissory estoppel and cannot demonstrate the presence of any "extraordinary circumstances" that require relief.

Any "promise" to Kozlowski was fraudulently induced and therefore cannot form the basis of a promissory estoppel claim. There is no evidence that Kozlowski relied on the DCP or the SERP to his detriment, nor is there evidence that Tyco should have reasonably expected Kozlowski to do so. Because he knew of his egregious crimes against the company, Kozlowski could not reasonably rely on receiving payment from the DCP and the SERP. Also, any detriment that Kozlowski might have experienced as a result of that unreasonable reliance was caused by his own misconduct. Finally, paying Kozlowski additional compensation under the DCP or the SERP would create, not avoid, injustice. No "extraordinary circumstances" require additional payments to Kozlowski; to the contrary, justice and equity require that Kozlowski forfeit these benefits, which accrued during the period of his criminal disloyalty against his employer.

D. Kozlowski is Not Entitled to Recover Under the Life Insurance – Shared Ownership Insurance Agreement (Ninth and Tenth Counterclaims)

1. New York's faithless servant doctrine bars Kozlowski's recovery under the Shared Ownership Insurance Agreement

The Shared Ownership Insurance Agreement is governed by New York law. (SUF ¶ 155 Exhibit 31 § 15). As discussed above, New York's faithless servant doctrine bars Kozlowski from recovering compensation that accrued during his period of faithlessness. *See supra* Part III.A.1. The Shared Ownership Insurance Agreement was entered into on March 26, 2001, well after Kozlowski's schemes to defraud the company had begun. (SUF ¶¶ 2, 94, 117, 155). Kozlowski is not entitled to any recovery under the Shared Ownership Insurance Agreement.

2. Kozlowski fraudulently induced the Shared Ownership Insurance Agreement

The Shared Ownership Insurance Agreement was signed in 2001. As detailed above, Kozlowski would not have been offered additional compensation or continued employment at the time of the signing of this agreement if he had not lied and concealed his breaches and crimes from his employer. The Shared Ownership Insurance Agreement was fraudulently induced, and Kozlowski cannot rely on it.

3. Promissory estoppel does not apply

Promissory estoppel is inapplicable to this or any other of Kozlowski's counterclaims. Similar to promissory estoppel under ERISA common law, promissory estoppel in New York has three elements: "a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained by the party asserting the estoppel by reason of the reliance." *Cyberchron Corp. v. Calldata Sys. Dev.*, 47 F.3d 39, 44 (2d Cir. 1995) (quoting *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 73 (2d Cir.

1989)). "In addition, some courts will apply the doctrine only when enforcement is necessary to avoid injustice." *Id.*

The "promise" obtained by Kozlowski was fraudulently induced. *See supra*. In light of Kozlowski's gross misconduct, any reliance on future compensation from Tyco was unreasonable and not foreseeable, and any injury incurred by Kozlowski is attributable to his own crimes, not to Tyco. Promissory estoppel is highly inappropriate where, as here, justice would be defeated rather than promoted.

E. Kozlowski's Claim Under Tyco's Bye-Laws Should Be Dismissed (Eleventh Counterclaim)

For his eleventh counterclaim, Kozlowski alleges that Tyco International Ltd. is required to indemnify him under section 102 of its bye-laws. (Kozlowski's Counterclaim, ¶¶ 43-44, 100-104). Kozlowski claims a right to indemnification for "costs and expenses…in connection with various civil litigation pending against him, including the Derivative, ERISA, Securities, and Tyco Actions pending against him in these MDL proceedings." (Kozlowski's Counterclaim, ¶ 44).

Tyco International Ltd. was organized under Bermuda law, which prohibits indemnification of an officer for liability arising in connection with the officer's "dishonesty" or "fraud." Bermuda Companies Act of 1981, 1989 revision, § 98. Specifically, any provision of the bye-laws of a Bermuda company "exempting [an] officer…from, or indemnifying [the officer] against any liability which by virtue of any rule of law would otherwise attach to him in respect of any fraud or dishonesty of which he may be guilty in relation to the company shall be void." *Id.*

Kozlowski's misdeeds spawned an avalanche of litigation against him, against Tyco, and against others. Kozlowski's answer and counterclaims specify four lawsuits for which he is seeking indemnification: "the Derivative, ERISA, Securities, and Tyco Actions pending against him in these MDL proceedings." (Kozlowski's Counterclaim, ¶ 44). Kozlowski is not entitled to indemnification for any of these actions because his "fraud" and "dishonesty" is at the heart of each suit. Bermuda Companies Act of 1981, 1989 revision, § 98.

In the shareholder derivative actions, *Ezra Charitable Trust v. Tyco Int'l Ltd.*, 466 F.3d 1 (1st Cir. 2006), shareholders claimed that Kozlowski breached his fiduciary duties to them with his fraudulent, dishonest, criminal conduct, including stealing from the company and failing to disclose his illegal actions. Bermuda law does not allow indemnification for this conduct, and Kozlowski is now estopped from denying his guilt.

In the ERISA suit, participants in 401(k) retirement plans sponsored by Tyco International (US) Inc., charged that Kozlowski failed to fulfill his fiduciary duties to them when he looted the company and concealed his misconduct, thereby depressing Tyco's stock. *Overby v. Tyco,* MDL No. 02-1335-PB (D.N.H.) The court declined to dismiss these class action claims against Kozlowski. These claims arose from Kozlowski's dishonesty and fraud, which Kozlowski is now estopped from denying, and thus Bermuda law prohibits indemnification.

Likewise, Bermuda law does not permit indemnification for the Securities Action, *In re Tyco Int'l Ltd. Sec. Litig,* MDL No. 02-1335-PB (D.N.H. Jan. 28, 2003); SUF ¶ 110, which alleged violations of federal securities law stemming, yet again, from Kozlowski's dishonesty and fraud. Bermuda Companies Act of 1981, 1989 revision, § 98. Kozlowski's convictions prevent him from denying his conduct in order to seek indemnification for this action.

The instant lawsuit is premised upon Kozlowski's fraud and dishonesty. That misconduct has been conclusively established, and indemnification is prohibited.

F. Kozlowski's Unjust Enrichment Claims Also Are Misplaced. (Twelfth Counterclaim)

"In order to prevail on a claim of unjust enrichment under New York law, plaintiff must demonstrate 1) defendant was enriched; 2) defendant's enrichment came at plaintiff's expense; and 3) 'circumstances were such that in equity and good conscience [defendant] should compensate [plaintiff].'" *Colliton*, 2008 U.S. Dist. LEXIS 74388, *21-22 (quoting *R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 60 (2d Cir. 1997)). Kozlowski cannot satisfy these elements.

Kozlowski contends that Tyco has been "unjustly enriched" by failing to make payments under the Retention Agreement, the DCP, the ERA, the SERP, the Shared Ownership Insurance Agreement, and Tyco's Bye-Laws. (Kozlowski's Counterclaim, ¶ 106). Tyco has demonstrated that the opposite is true. Tyco was severely damaged by Kozlowski's dishonesty and criminal conduct, while Kozlowski has unjustly profited from his misdeeds at Tyco's expense. In addition, as previously detailed, because of these transgressions, Tyco has no further obligation to Kozlowski under any of the arrangements he identifies. Thus, Kozlowski cannot show that Tyco has been enriched, nor can he prove that such enrichment came at his expense.

Kozlowski also cannot establish that "circumstances were such that in equity and good conscience [Tyco] should compensate [Kozlowski]." *Colliton*, 2008 U.S. Dist. LEXIS 74388, *21-22. Despite his generous salary and fiduciary relation to Tyco, Kozlowski was convicted of serious crimes against his employer, including outright theft of millions of dollars. Under these circumstances, equity and good conscience do not require that Kozlowski be further compensated for his breaches, pursuant to agreements that he fraudulently induced or materially breached. Rather, equity demands that he forfeit the proceeds of his misconduct, including all compensation paid during his disloyalty.

G. Tyco Is Entitled to Judgment on Kozlowski's Conversion Claim. (Thirteenth Counterclaim)

"Under New York law, to establish a conversion action, a plaintiff must show legal ownership of, or a superior possessory right in, the disputed property, and 'that the defendant exercised [unauthorized] dominion over that property, . . . to the exclusion of the plaintiff's rights.'" *United States v. New York State Div. of the Lottery*, 2007 U.S. Dist. LEXIS 98828. at *9 (S.D.N.Y. Mar. 13, 2007) (quoting *Middle East Banking Co. v. State Street Bank Int'l*, 821 F.2d 897, 906 (2d Cir. 1987)). "Conversion is an intentional exercise of dominion over a chattel which so seriously interferes with the right of another to control it that the actor may be justly required to pay the other the full value of the chattel." *Id.* at *9-10 (quoting Restatement (Second) of Torts, § 222A). There is no evidence that Tyco has improperly exercised dominion over property belonging to Kozlowski, or that Tyco improperly withheld compensation from Kozlowski.

Kozlowski is not owed any further compensation from Tyco. Essentially, the conversion counterclaim rehashes Kozlowski's thirteen other counterclaims by alleging that he is due various payments under the Retention Agreement, the DCP, the ERA, the SERP, the Executive Life Insurance Policy, the Shared Ownership Insurance Agreement, and Tyco's Bye-Laws. Tyco has already demonstrated why Kozlowski is not entitled to payment under any of these plans or agreements.

H. Kozlowski Has No Claim Under New York's Labor Law. (Fourteenth Counterclaim)

Kozlowski alleges that Tyco has violated New York Labor Law § 193 by making a "deduction" or "charge against" his "wages." But, an employee "cannot assert a statutory claim for wages under the Labor Law if he has no enforceable contractual right to those wages." *Ellis v. Provident Life & Accident Ins. Co.*, 3 F. Supp. 2d 399, 413 (S.D.N.Y. 1998). Section 193 also specifically allows employers to make deductions "in accordance with the provisions of any law or any rule or regulation." New York Labor Law, § 193. Thus, to the extent Tyco's legal defenses to Kozlowski's other counterclaims succeed, Kozlowski's claim under § 193 fails.

Furthermore, § 193 is inapplicable to the amounts Kozlowski seeks to recover because these payments are "benefits or wages supplements" as defined by §§ 190(1) and 198-c of the New York Labor Law. Because Kozlowski was employed in an "executive" position earning more than $900 per week, deductions from "reimbursements for expenses," "health, welfare, and retirement benefits," and "separation" pay are not considered "wages" and are therefore not protected under § 193. New York Labor Law §§ 190(1), 193 & 198(c).

Section 190(1) defines wages to include "benefits or wage supplements as defined in [§ 198-c] of this article," but for executives earning more than $900 per week, §§ 190(1) and 198-c exclude "reimbursement for expenses; health, welfare, and retirement benefits; and vacation, separation or holiday pay" from the definition of "benefits or wage supplements." A New York state court described the relationship between §§ 190(1), 193, and 198-c as follows:

> Under Labor Law §§ 190 and 198-c the definition of wages applicable to the provisions set forth in section 193 includes separation pay. However, section 198-c(3) states that "[t]his section shall not apply to any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of [nine] hundred dollars a week." If the prohibition in section 198-c applies due to the person being in this exempt administrative class, then separation pay is not included in the definition of wages under section 190. The intertwining of the definitions and sections of the Labor Law then leads to the conclusion that *deductions from separation pay, for the exempt administrative class defined in Labor Law § 198-c, would not be prohibited under Labor Law § 193.*

Cohen v. ACM Med. Lab., 178 Misc. 2d 130, 135 (N.Y. Sup. Ct. 1998) (emphasis added); *see also Pachter v. Bernard Hodes Group, Inc.*, 10 N.Y.3d 609, 615 (2008). The amounts sought by Kozlowski under the Retention Agreement, the ERA, the DCP, and the SERP are "separation pay" and "retirement benefits." The payments sought under the Executive Life Insurance Policy and Shared Ownership Insurance Agreement are "welfare benefits." Through his indemnification claims, Kozlowski seeks "reimbursement for expenses." Sections 190(1) and 198-c provide that, for highly-paid executives, these amounts are not "wages" protected under § 193.

Finally, Tyco should prevail on this counterclaim with respect to the ERA, the DCP, and the SERP because ERISA preempts claims under New York Labor Law §§ 193 and 198-c where the payment sought arises under a benefit plan governed by ERISA. *See Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 327-328 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986); *Henry v. Jones*, 2009 U.S. Dist. LEXIS 6508, *8-12 (S.D.N.Y. Jan. 27, 2009); *Tappe v. Alliance Capital Mgmt. L.P.*, 177 F. Supp. 2d 176, 18-188 (S.D.N.Y. 2001). Accordingly, the Fourteenth Counterclaim should be dismissed.

I. Kozlowski's Equitable Claims Are Barred by the Doctrine of Unclean Hands. (First, Third, Fourth, Seventh, Eighth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth Counterclaims)

Where a claimant relies on principles of equity, courts continue to enforce "the ancient principle that he who seeks equity must do equity." *First Nat'l Bank v. Pepper*, 547 F.2d 708, 716 (2d Cir. 1976). Under this maxim, equitable relief is barred where the claimant has "unclean hands." *Colliton*, 2008 U.S. Dist. LEXIS 74388, at *21-22. "[B]ecause of [a former employee's] unclean hands," a federal court within this district recently denied a request for equitable relief for unpaid executive compensation benefits, finding that the employee had obtained his employment "through concealment of his criminal acts and violations of numerous codes of legal ethics." *Id.* at *22. Kozlowski's claims for equitable relief should meet the same fate. Kozlowski intentionally deceived and looted his employer, obtaining continued employment, compensation, and benefits only because he concealed his criminal acts and other significant breaches of duty.

Kozlowski's third and fourth counterclaims, which seek plan benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), are doomed by his unclean hands. "[R]elief sought [under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) is] equitable in nature." *Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1259 (2d Cir. 1996); *see also Tischmann v. ITT/Sheraton Corp.*, 145 F.3d 561, 568 (2d Cir. 1998) ("cases involving ERISA benefits are inherently equitable in nature, not contractual"); *DeFelice v. Am. Int'l Life Assurance* Co., 112 F.3d 61, 65 (2d Cir. 1997) (same). As multiple federal courts have noted, the unclean hands doctrine applies with equal force to ERISA cases:

> Defendants also rely on the "unclean hands" doctrine, which federal courts have considered and applied in ERISA actions. *See Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 993 (7th Cir. 1993); *Holt v. Winpisinger*, 258 U.S. App. D.C. 343, 811 F.2d 1532, 1542 (D.C. Cir. 1987); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir. 1985). This doctrine "'closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief….'" *Ellenburg*, 763 F.2d at 1097. The material factors are that the plaintiff "dirtied" his hands in acquiring the right he now asserts or otherwise acted fraudulently or deceitfully. *Id.*

Ries v. Humana Health Plan, 1995 U.S. Dist. LEXIS 16592 (N.D. Ill. Nov. 8, 1995); *see also Greenwood Mills v. Burris*, 130 F. Supp. 2d 949, 955 (M.D. Tenn. 2001). Kozlowski's unclean hands are fatal to his ERISA benefit claims.

In his seventh, eighth, and tenth counterclaims, Kozlowski pursues the equitable doctrine of promissory estoppel. *See Halifax Fund, L.P. v. MRV Comm'ns, Inc.*, 54 Fed. Appx. 718, 719 (2d Cir. 2003) (describing promissory estoppel as an "equitable claim"); *Cherne Contracting Corp. v. Marathon Petroleum Co.*, 578 F.3d 735, 745 (8th Cir. 2009). Kozlowski's twelfth counterclaim also invokes principles of equity, relying on the theory of unjust enrichment. *See Superintendent of Ins. v. Ochs (In re First Cent. Fin. Corp.)*, 377 F.3d 209, 214 (2d Cir. 2004) (describing unjust enrichment as an "equitable claim").

In connection with his first, eleventh, twelfth, thirteenth, and fourteenth counterclaims, Kozlowski demands "specific performance" of Tyco's duty to indemnify and defend him. (Kozlowski's Counterclaim, Prayer, ¶¶ a & f). Kozlowski's unclean hands preclude these demands for specific performance, which is an "'extraordinary' *equitable* remedy." *Lucente v. IBM*, 310 F.3d 243, 262 (2d Cir. 2002) (emphasis added); *see also Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1223 (10th Cir. 2009); *United States v. Apex Oil Co.*, 579 F.3d 734, 736 (7th Cir. 2009).

Although he "seeks equity," Kozlowski has not "do[ne] equity." *First Nat'l Bank*, 547 F.2d at 716. To the extent he relies on principles of equity, Kozlowski's counterclaims should fail because he has not come to the Court with clean hands. Kozlowski acquired the "rights" he purports to enforce through fraud, deceit, breach of fiduciary duty, and concealment of his misconduct. This conduct forecloses the equitable relief he seeks.

CONCLUSION

Kozlowski engaged in an illegal scheme to defraud his employer over a course of years. Because he was convicted of numerous crimes against Tyco, Kozlowski is estopped from denying the facts underlying Tyco's claims, which are based on the same conduct as his convictions, and those facts are conclusively established. Accordingly, Tyco is entitled to summary judgment against Kozlowski on liability for all counts alleged in its Amended Complaint, with damages to be determined at a trial limited to that issue.

Moreover, Kozlowski has asserted no legitimate ground to recover compensation from Tyco and his claims for wages and benefits are barred. Accordingly, Tyco is entitled to final judgment on Kozlowski's counterclaims.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2010, I electronically filed the foregoing *Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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